(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAY 30 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director.

The petitioner is a manufacturer and distributor of fashion jewelry. It seeks to employ the beneficiary permanently in the United States as a senior systems accountant. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Upon review of the record, the AAO has determined that the petitioner's 2011 federal income tax return accompanying its appeal establishes its ability to pay the proffered wage for 2011. However, the petition may not be approved, as the record does not establish the beneficiary's qualifying work experience. Therefore, the AAO will remand the case to the director for further action.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in Accounting.
H.5. Training: None required.
H.6. Experience in the job offered: 60 Months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Master's Degree (no years of experience will be accepted as an alternate combination).

H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: Accountant or Systems Accountant.
H.14. Specific skills or other requirements: Any suitable combination of education, training, or experience is acceptable.

The labor certification states that the beneficiary qualifies for the offered position based on a bachelor's degree in accounting and experience as an accountant for in Northvale, NJ from October 23, 2006 to October 23, 2012. The labor certification also indicates that the beneficiary worked for as an accountant from December 12, 2005 to May 4, 2006.

The record contains an experience letter from Human Resource Manager on letterhead dated March 8, 2012, stating that the company employed the beneficiary as an accountant since October 23, 2006.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record also contains another experience letter from an unknown author on letterhead dated April 15, 2011, stating that the company employed the beneficiary as an accountant from December 12, 2005 through May 4, 2006. We cannot accept the latter experience letter because it has not been signed or identified by a trainer or employer giving the name, address, and title of the trainer or employer conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158.

On August 3, 2011, the beneficiary and the petitioner in that case, signed and certified under penalty of perjury, on a separate ETA 9089 filed by that he was employed by as an accountant from October 23, 2006 to October 23, 2009. The beneficiary claimed no other employment experience. Based on this ETA 9089, USCIS approved a Form I-140 petitioned by for the beneficiary as a professional systems accountant (O*NET Code 13-2011.01), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3).

On December 14, 2011, the beneficiary and the petitioner in the current case, signed and certified under penalty of perjury, on the current ETA 9089 filed by the petitioner

that the beneficiary was employed by as an accountant from October 23, 2006 to January 23, 2012. Additionally, the beneficiary stated and provided an experience letter claiming to have been employed by as an accountant from December 2005 to May 2006. The two Forms 9089 are inconsistent in that one claims that the beneficiary worked for from October 23, 2006 to October 23, 2012 and the other from October 23, 2006 to October 23, 2009. Further, the beneficiary stated on one of the forms ETA 9089 that he worked for and on the other one, the beneficiary states nothing about working for Moreover, the beneficiary signed and certified under penalty of perjury, on a Form G-325A, Biographic Information, signed December 14, 2011 and filed in connection with an adjustment of status application, that he was employed by as an accountant from October 23, 2006 to present; and to have been employed by as an accountant from December 2005 to May 2006.

The record does not resolve these inconsistencies. As such, the AAO is remanding to the director to request independent objective evidence to establish the length of the beneficiary's qualifying employment, if any, with and with *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition... [i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.